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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1538

THE BANK OF CAMILLA,
Petitioner,

versus

THE COLUMBIAN PEANUT COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE COLUMBIAN PEANUT COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Bank of Camilla, a banking corporation, of Camilla, Georgia, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on January 26, 1973 (rehearing denied on the 13th day of April, 1973).

OPINIONS AND ORDER BELOW

Neither the opinions nor orders of the District Court of the United States for the Middle District of Georgia are reported. The opinion of Hon. J. Robert Elliott, District Judge dated December 3, 1971, which includes both findings of fact and conclusions of law, is included in the Appendix at pages 1a to 8a and the orders of the

District Court pursuant thereto, dated 6th day of December, 1972, are included in the Appendix at pages 8a to 9a.

Nor are the opinions and orders of the United States District Court for the Fifth Circuit reported. Its opinion dated January 26, 1973, are included in the Appendix at pages 10a to 27a.

The opinion of the United States Court of Appeals for the Fifth Circuit dated 13th day of April, 1973, denying the motion of Bank of Camilla for a rehearing is set forth in the Appendix at page 27a.

JURISDICTION

The jurisdiction of this Court invoked under Section 1254(1) of Title 28, United States Code Annotated.

QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Can the relationship of bank and customer exist (as contemplated by UCC) when only dealings was that bank paid drafts of Columbian out of its funds, Columbian having no account with bank, then sent the drafts to Columbian, who after having chance to inspect them, paid to bank face amount of drafts?

(2) Can one be said to maintain an account in a bank when he has no deposit of any kind with said bank?

(3) Can one be said to be a customer of a bank as defined by Uniform Commercial Code when he has never made a deposit of any kind with the bank?

(4) Can a bank be said to agree to collect "items" as contemplated by UCC when only agreement was that bank would cash all of drafts presented from its funds, then send the drafts direct to the maker who then reimbursed the bank?

(5) Did Columbian "reacquire" the checks or drafts in question, so as to be barred from suing the Bank of Camilla, as provided in UCC?

(6) Because an agent forges the payees names to drafts, and then employer, Columbian, with full knowledge of forgery reimburses the payees full amount of forged drafts; is not the acts of employer ratification of agent's acts and is not employer thus bound by agent's acts?

(7) Is Columbian entitled to sue Bank of Camilla, under the facts of this case, for wrongfully paying the checks of Columbian bearing forged endorsements?

STATUTES INVOLVED

This case involves the following Sections of the Uniform Commercial Code and of the Code of Georgia:

Georgia Code Sections

(1) Ga. Code 109 A-3-206 (UCC 3-206)
(2) Ga. Code 109 A-3-208 (UCC 3-208)

(3) Ga. Code 109 A-3-405(1)(b) (UCC 3-405(1)(b))
(4) Ga. Code 109 A-3-601(3) (UCC 3-601(3))
(5) Ga. Code 109 A-3-606 (UCC 3-606)
(6) Ga. Code 109 A-4-102(2) (UCC 4-102(2))
(7) Ga. Code 109 A-4-104(a)(e)(g) (UCC 4-104(a) (e)(g))
(8) Ga. Code 109 A-4-201 (UCC 4-201)
(9) Ga. Code 4-302
(10) Ga. Code 4-303
(11) Ga. Code 4-311

STATEMENT OF THE CASE

Columbian Peanut Company (hereafter Columbian) engaged Harry Frosteg, who did business as Pelham Peanut Company, to act as its agent in purchasing large quantities of peanuts from growers in southwest Georgia, and in that connection turned over to Frosteg a large number of blank checks or drafts without restriction except that he was to use them to pay for peanuts bought for Columbian.

Columbian did not carry an account of any kind with The Bank of Camilla, but knowing that a large number of its checks which would be issued by Frosteg would be presented to The Bank of Camilla, Columbian made an arrangement with the bank whereby the bank would pay these checks with the bank's funds and daily transmit to Columbian the checks so honored and Columbian would remit to The Bank of Camilla the total amount of the checks so honored by its draft drawn on an Atlanta bank. The Bank of Camilla was to be paid a

ee of 1/8 of 1% of the amount of the checks for its ervices. Although, as above noted, Columbian car- ied no account at the Bank of Camilla and the checks vere, therefore, not charged to any account at he bank, and although the checks were not transmit- ed by The Bank of Camilla through banking channels o any other bank, it was the practice in The Bank f Camilla to run all checks which were handled by he Bank in any manner through an identifying r proofing machine which stamped on each check the ollowing legend: "Pay to the order of any Bank, Bank- r, or Trust Co. All prior endorsements guaranteed." The date on which the check was honored was also ncluded in the stamp.

Although Frosteg was supposed to deliver the Colum- ian checks to the individual growers from whom he nade purchases for the Columbian account, it de- eloped that he did not do so. Instead, he fraudulently ndorsed the Columbian checks with the name of the ayees and then deposited these checks to his account nd issued checks of his company, Pelham Peanut Company, to the growers.

Many checks were handled by Frosteg in this fashion nd there was no difficulty until Frosteg's company, Pelham Peanut Company, found itself in financial traits and 37 of the Pelham Peanut Company checks bounced" for insufficient funds. As might be expect- d, the growers who had sold their peanuts to Colum- ian and whose names had been forged by Frosteg vent to Columbian for their money. Columbian had ach of these growers endorse the Columbian check,

on which the original endorsement had been forged back to Columbian and then turn over to Columbian the Pelham Peanut Company check which had bounced. Then Columbian paid off each grower who was involved and brought suit against The Bank of Camilla for $53,624.10, which was the total amount of these 37 checks, contending that The Bank of Camilla was liable for the loss sustained because it had paid checks on which the endorsements were forgeries. The Bank of Camilla made a motion for a directed verdict at the conclusion of the Plaintiff's evidence and also at the conclusion of the introduction of all evidence in the case. The jury returned a verdict in favor of Columbian against The Bank of Camilia for the sum of $23,624.10.

On motion of the Bank, the District Court granted judgment N.O.V. and dismissed claim of Columbian, but in the alternative granted a new trial to the bank.

The Fifth Circuit which rendered the judgment complained of, then reversed the judgment of the District Court and remanded the case to be tried by a jury solely on the issue as to whether the bank wrongfully paid the checks whose endorsements had been forged by Frosteg, agent of Columbian.

REASONS FOR ALLOWANCE OF WRIT

The decision of the Fifth Circuit Court of Appeals should be reviewed because it erroneously interprets the Uniform Commercial Code, as adopted by the State

of Georgia, so as to disrupt the orderly banking procedures in the United States.

The Uniform Commercial Code has been adopted in practically every state and it clearly defines the duties, and responsibilities of a bank and its customers. In spite of the plain language of the Code, the Fifth Circuit has put its own interpretation on the various Code Sections which are absolutely contrary to the plain and unambiguous language of the Code, such as, the Court said one had an "account" with a bank when it had any agreement concerning payment of drafts, even though there was no deposit of any kind with the bank.

Then too the Fifth Circuit held, contrary to plain language of Code, that Columbian was a customer of the bank.

The decision of the Appellate Court, in substance says that a bank cannot have a special arrangement of any kind with a firm without creating the relationship of bank and customer. If this decision is allowed to stand it will prove chaotic to the banking industry.

Then too the Appellate Court completely disregarded the law and decisions of Georgia regarding principal and agent and ratification of agents acts by principal.

And last, but by no means least, the Appellate Court has made the astounding statement that the Bank was in a better position to protect itself from the forgery of Columbian's agent, by obtaining insurance, and this

seems to form the basis of the opinion of said court, since it is not, supported by statute or case law.

We think that this Court has a duty and responsibility to review this decision of the Fifth Circuit; since the questions presented are of nation wide importance and should be resolved according to law, and also because:

I

This Court erred in that the Court misconstrued the facts, the law, the plain provisions of the Uniform Commercial Code as set forth in Sections 109A-4-104 and 109A-4-102(2) of Code of Georgia and the cases cited, in holding that the relationship of bank and customer existed between the Bank of Camilla and Columbian Peanut Co., and in determining that Columbian had an account with said bank, and was a customer, and that the bank had agreed to collect "items" for Columbian.

This Court decided that the relationship of a bank and its customer and depositor existed in this case and then cited the case of *Atlanta National Bank v. Burke*, Ga. 1888, 7 SE 739 as authority for its decision.

This Court relies on a pretended factual situation in which a bank pays a check on an unauthroized endorsement and charges it to the account of a depositor, without the knowledge of the latter until later receiving statement of the account. Thus, it was charged to the account of the depositor, on an unauthorized endorsement, without any opportunity on his part to inspect

he endorsement, discover any unauthorized signature nd determine generally its validity.

This fictional premises bears no remote semblance o the uncontroverted realities of this case as the facts re known to exist, because the drafts were (1) not lrawn on the Bank of Camilla, (2) Columbian had no ccount at said bank, (3) nothing was charged to Columbian, (4) no items were collected for Columbian, ut simply the Bank advanced the funds to pay the lrafts presented, then they were sent to Columbian y the Bank, who after inspecting the same had the ight to refuse payment, but in every instance here nvolved, paid the bank. Thus, there was no element ere of a normal banking transaction as contemplated y the cases cited by the Court.

This Court also misconstrued the applicable law when it cited the case of *First National Bank v. Guaranty Life Insurance Co.*, 45 Ga. App. 289 (1932 not 1962, as stated). That was a case where agent's forged check was cashed by Bank and charged to account of drawer. The agent did not have authority to draw checks on Insurance Company. So the factual situation is entirely different from the facts of the case at bar, since in this case Columbian turned over to Frosteg several hundred blank checks or drafts without restriction except that he was to use them to pay for peanuts bought for Columbian. The checks were not filled out and turned over to Frosteg, as stated by the Fifth Circuit.

We think not only did the Court misconstrue and misapply the law, but failed to consider cases where simi-

lar facts existed as here. A case in point and which was previously cited to the Court is that of *Litchfield Shuttle Co. v. Cumberland Valley National Bank*, 134 Tenn. 379, 183 S.W. 1006 (cited in 39 ALR2d 648-649 by the Court). In that case it appeared that plaintiff's employee who was authorized to draw checks in plaintiff's name (same authority Frosteg had here) drew checks payable to various individuals with whom plaintiff had business dealings and then forged the name of the payees and cashed them. (Identical with the facts of our case) In an action by the plaintiff as drawer of checks against the drawee bank the Court held plaintiff was precluded from recovery because by giving agent authority to draw checks, his conduct was within apparent scope of his authority and barred plaintiff from relief against bank.

Our case is much stronger because Columbian had no account with the bank against which the checks were charged. This Court should keep in mind that Columbian turned over to Frosteg hundreds of blank drafts and he and his employees had the right to issue said checks in name of Columbian.

Since the entire decision of the Appellate Court is based on a false assumption that Columbian had an account at the Bank of Camilla, then the Court proceeded to compound this error by relying upon the genera. principle, "most courts hold as a general rule that an intermediary bank which receives a check on a forged endorsement and collects it from a drawee bank is liable to the drawer of the check for his loss, the bank's acceptance of the check for collection being at its peril

as to a possible forged endorsement," and the court cited 10 AM Jur. 2d Banks Section 623, p. 587 and Section 629, 596.

This is a true statement of the law but cannot apply to the facts here. The checks or drafts in question were drawn by Frosteg, agent of Columbian, to order of various growers. These checks in question which were presented to the Bank of Camilla were not drawn on any account of Columbian at said bank because it had no account. The Bank of Camilla accepted the checks under its agreement with Columbian, paid the face amount out of *its* funds, then sent the checks, not through another bank, but direct to Columbian, who after having an opportunity to question the authenticity of the checks and endorsements, paid to the Bank all sums advanced by said Bank for Columbian.

It is, therefore, crystal clear that this was no normal banking transaction between bank and customer, but a special arrangement between Columbian and the Bank, and thus there is no legal basis for the conclusions reached by the Appellate Court that the District Court erred in determining that the normal relationship of bank and customer did not exist in this case.

The Appellate Court said, "Concededly the question is a difficult one, and no case has been found where the precise relationship existed as that between Columbian and the banks in this case."

There can be no basis for the Fifth Circuit Court's conclusion since its position is not based on any case

law, completely ignores the plain provisions of the Uniform Commercial Code and misapplies the admitted facts to unapplicable law.

II

More amazing was the Fifth Circuit's conclusion that "Columbian was a customer of the bank," within the definition of Section 109A-4-104 of Code of Georgia,

(g) "Item" means any instrument for the payment of money even though it is not negotiable but does not include money.

(a) "Account" means any account with a bank and includes a checking, time, interest or savings account.

(e) "Customer" means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank.

for either of two reasons. (1) Columbian had an account with the bank, though account was tallied daily. "Account" is not limited to the accounts specifically named. (2) The bank had agreed to collect "items" for Columbian. The checks cashed by the bank were clearly "items" as defined by the above statute."

It is hard to realize that such statements were made in the face of the clear language of the statute and it is easily understood, however, why the court failed to cite one single case to support such erroneous in-

terpretations of the plain unambiguous words of the statutes.

Columbian had never made a deposit with the bank of any kind, neither checking, time, interest or savings account, and, therefore, had no account in banking terminology with the Bank of Camilla. Had the Court referred to Webster's Dictionary, they would have found these pertinent definitions of an "account." (1) "A sum of money or its equivalent deposited in the common cash of a bank and subject to withdrawal at the option of the depositor."

Furthermore, in the *Atlanta National Bank v. Burke* case, Ga. 1888, 7 SE 738, cited by the Court the gist of the decision refers to "where one deposits money in a bank, the bank immediately becomes the debtor of the depositor for money deposited, and in order to discharge itself from liability to the depositor, the bank must pay the money to the depositor, or as directed by him." Therefore, it is crystal clear that "account" means a "deposit" in a bank by someone. Therefore, there was no "account" involved here. It can be easily seen how such an interpretation by the Fifth Circuit could adversely affect all bank relationships.

Then it was said that Columbian was a customer because it had agreed to collect "items" for Columbian. The uncontroverted facts dispute this statement. The Bank of Camilla did not agree to "collect" any items for Columbian. What it did agree to do, was to advance from its own funds (not those of Columbian) sums to pay the bank drafts of Columbian, and then

to send these direct to Columbian, who in turn remitted to the bank. It is hard to conceive how the learned judges of the Fifth Circuit could say the bank "agreed to collect items" for Columbian. There was no "collection of items" involved here at all.

III

The Fifth Circuit also held that Columbian was a "customer" of the Bank of Camilla, as contemplated by Section 109A-4-104(e) of Code of Georgia (UCC 4-104(e)).

Again we refer to the plain language of the statute which says that a "customer" is one who has an "account" with a bank or for whom a bank has agreed to collect items. While anyone who has any dealings with a bank might be generally referred to as a customer of the bank, yet in determining the rights and liabilities of a "bank" to a "customer" we must read what the statute says. And a customer is defined as one having an "account" which means a deposit of same kind with a bank. This fact did not exist here.

Next as previously pointed out, the bank did not agree to "collect" any "item" for Columbian. The only agreement was that bank would advance its own funds to pay Columbian checks and were in turn repaid by Columbian for face amount plus one-eighth of one per cent for so advancing its money. No collection of items by bank for Columbian was in anyway involved.

Also see Section 109A-4-105(d) of Code of Georgia, which provides that "collecting bank" means any bank handling an item for collection except payer bank.

Thus, it is clear that Columbian was not a "customer" of the bank as contemplated by the Uniform Commercial Code and the conclusions to the contrary by the Fifth Circuit simply can't be supported by law, facts or statutes.

Thus, the Fifth Circuit erroneously concluded that the principle of law regarding the responsibility of a bank to its customer, prevailed in this case.

IV

The Fifth Circuit misinterpreted the undisputed facts and misapplied the meaning of the languages of the Uniform Commercial Code in concluding that Columbian did not "reacquire" the checks in question, and were then not barred from bringing action against the bank for allegedly wrongfully paying checks on Columbian bearing forged endorsements.

The Appellate Court erroneously held that since the stamp of the bank was placed on each check that the negotiability of the check was destroyed. The stamp read, "Pay to any Bank, Banker or Trust Company. All prior endorsements guaranteed."

In the first place the Court completely ignored the plain facts of the case. The uncontradicted showed that this stamp was placed on every item that was proc-

essed through the bank, and had no effect except when the item was a check to be sent to another bank or trust company for payment. Hence this stamp could actually have no meaning since the checks in question were sent directly to Columbian for payment and not through any bank or trust company.

While the Court was right in saying that Columbian had no right to sue on the endorsement it was in error once more in interpreting the suit as "based on a claim that the banks wrongfully paid Columbians' checks bearing forged endorsements."

Actually Columbian is suing the Bank of Camilla for the amount of 37 checks drawn on it by Frosteg or his employees and made payable to various growers, and which payees names were fraudulently endorsed by Columbian's agent, Harry Frosteg, the total amount of the checks being $53,624.10. It is specifically set forth in Columbian's petition that it paid to each grower whose name was forged by their agent Frosteg the amount of said check after each payee endorsed the checks back to Columbian, and also turned over to it all checks of Pelham Peanut Company issued to them and unpaid.

In paragraph 25 of the original petition it is stated: "And that Columbian is entitled to be reimbursed for each of the checks wrongfully and illegally accepted by each of the two banks for which reimbursement has not yet received." It is very clear that Columbian is suing this bank on the checks and not in tort for wrongful conversion or like matter. It is, therefore,

important to determine then if Columbian is barred as a matter of law from proceeding against the Bank by having said checks endorsed to it by the various growers whose names were forged thereon by Frosteg.

Section 109A-3-208 of Code of Georgia provides as follows:

> "Where an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been cancelled is discharged as against subsequent holders in due course as well."

Section 109A-3-601(3) of Code of Georgia provides as follows:

> "The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument
>
> "(a) reacquires the instrument in his own right; or
>
> "(b) is discharged under any provision of this Article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral."

It is not only clear that Columbian reacquired the checks as contemplated by Uniform Commercial Code but its attorneys filed a written stipulation with the District Court admitting and conceding that said checks were "reacquired".

The Fifth Circuit said Columbian got possession of the checks at the time it paid the bank, not at a later time when Columbian paid the growers-payees, and that by having the checks endorsed back to it Columbian did not relinquish its right to sue the bank for wrongfully cashing said checks; and that the checks had ceased to be negotiable instruments by virtue of the stamp aforesaid, and then the Court made this amazing statement. "Sections 109A-3-208 and 109A-3-601 (3) are intended to serve another and unrelated purposes of eliminating circuity in the order of responsibility."

None of these statements will stand up under scrutiny. In the first place it doesn't matter *when* Columbian got physical possession of the checks in question. That had nothing to do with the reacquisition of the checks. This occurred only *when* the payees endorsed the checks to Columbian.

As shown before the checks were negotiable and the original payees had the right to sue Columbian on said checks and could have joined the bank. However, Columbian chose to pay the checks and have them endorsed back to it, and then Columbian became both the drawer and maker and squarely within the provisions of the aforesaid Code Sections.

Also Columbian had no right to sue on the checks in question until they were endorsed back to it, because the checks were not charged to its account wrongfully, and since they were payable to certain payees, growers, they were the only ones who could have sued thereon. But by paying said checks, which they were not compelled to do, having them endorsed back to it, Columbian brought itself under the reacquisition provisions of the Code and cannot recover against the bank.

In this connection the text writers in their notes to these same sections of the Uniform Commercial Code, which have been quoted above stated:

> "When any party reacquires the instrument in his own right his own liability is discharged, and any intervening party to whom he was liable is also discharged as provided in Code Section 3-208 on reacquisition when he is left with no right of action against any intervening party and no right of recourse against any prior party, all parties are obviously discharged."

It also seems apparent that in any case intervening endorsers are discharged as to the reacquirer, since if the reacquirer attempted to enforce it against them they would have an action back against the reacquirer. Stated otherwise, when Columbian reacquired its own checks from the grower-payees it became both maker and last endorser and if Columbian could recover against the Bank of Camilla then the bank would have a right of action against them as last endorser. The

conclusion is that there can be no liability of the Bank of Camilla to Columbian by virtue of the reacquisition of the checks in question.

Therefore, the Fifth Circuit has ignored the plain provisions of the Uniform Commercial Code, has misinterpreted the plain facts, and if its decision is allowed to stand, it will create havoc in banking and financial circles.

V

The Fifth Circuit also erred in holding that since Frosteg, the agent of Columbian, deviated from his authority, Columbian was not bound by his actions; thus completely ignoring the provisions of Sections 4-302 and 4-303 and 4-311 of the Code of Georgia.

The evidence adduced on the trial on this case, including the testimony of Frosteg, the manager of Columbian's Pelham office, Johnson, its vice president Brennan and documentary evidence, clearly showed that Frosteg, acting through his Company, Pelham Peanut Company, was an agent of Columbian. This fact was not denied by anyone in this case. After discovering the forgeries of its agent, Columbian voluntarily paid all the grower-payees whose names Frosteg had forged on the checks in question and by doing so Columbian ratified the acts of Frosteg and it is bound by his fraudulent acts and cannot recover against the Bank of Camilla, as a matter of law.

Georgia Code Section 4-302 provides that:

> "The principal shall be bound for the care, of his agent within the scope of his authority; if the agent shall exceed his authority, the principal may not ratify in part and repudiate in part; he shall adopt either the whole or none."

Georgia Code Section 4-303 provides that:

> "A ratification by the principal shall relate back to the act ratified, and shall take effect as if originally authorized. A ratification may be express, or implied from the acts or silence of the principal. A ratification once made may not be revoked."

Georgia Code Section 4-311 provides that:

> "The principal shall be bound for the care, diligence, and fidelity of his agent in his business, and hence he shall be bound for the neglect and fraud of his agent in the transaction of such business."

Thus Columbian, when it discovered the forgeries, voluntarily paid the growers, it cannot be denied that the fraudulent acts of the agent Frosteg were ratified. If the growers accepted the Pelham Peanut Co. checks for their peanuts, and if Columbian was not bound by the giving of said checks, how can it be said Columbian became liable to grower for peanuts? The only logical deduction is that the liability of Columbian was on the

checks of their to growers, given by their agent Frosteg and where with full knowledge, of agent's acts Columbian paid the growers, the agent's acts were then and there ratified.

This Court completely ignored and overlooked the case of *Planters Rice Mill Co. v. Merchants Bank*, 78 Ga. Rep. 574, where it was held where an agent to issue warehouse receipts, by issuing fictitious ones, acted fraudulently within the scope of his authority. Columbian thus became bound by acts of its agent Frosteg, even though he acted fraudulently. See also *Litchefield Shuttle Co. v. Cumberland Valley National Bank*, supra.

CONCLUSION

We submit that the judgment of the United States Court of Appeals for the Fifth Circuit dated January 26, 1973 (rehearing denied 13 day of April, 1973), should be reviewed by this Court.

We do not believe that this Court will stand idly by and let the decision stand unchallenged. To do so would create uncertainty and indeed much doubt and confusion in banking circles and thus interstate trade.

We plead with this Court to grant certiorari and to reverse the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

TWITTY & TWITTY

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P. O. Box 385
Camilla, Georgia 31730
Attorneys for Bank of Camilla

CERTIFICATE OF SERVICE

The undersigned counsel for petitioner hereby certifies that true copies of the foregoing petition have been served on counsel for the respondent, by disposing the same in the United States Post Office, with first-class postage prepaid, addressed to the law firm of Scheer & Elsner, 522 Fulton Federal Building, Atlanta, Georgia 30303, and H. Thaxton Monk, Jr., P. O. Box 364, Pelham, Georgia 31779, attorneys for the respondent, The Columbian Peanut Company.

Dated: ____ day of May, 1973.

Frank S. Twitty,
Counsel for Petitioner
P. O. Box 385
Camilla, Georgia 31730

APPENDIX

MEMORANDUM OPINION AND ORDER ON MOTION OF DEFENDANT, THE BANK OF CAMILLA, FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

(Number and Title Omitted)

Filed: Dec. 6, 1971

Columbian Peanut Company (hereafter Columbian) engaged Harry Frosteg, who did business as Pelham Peanut Company, to act as its agent in purchasing large quantities of peanuts from growers in southwest Georgia, and in that connection turned over to Frosteg a large number of blank checks or drafts without restriction except that he was to use them to pay for peanuts bought for Columbian.

Columbian did not carry an account of any kind with the Bank of Camilla, but knowing that a large number of its checks which would be issued by Frosteg would be presented to the Bank of Camilla, Columbian made an arrangement with the bank whereby the bank would pay these checks with the bank's funds and daily transmit to Columbian the checks so honored and Columbian would remit to the Bank of Camilla the total amount of the checks so honored by its draft drawn on an Atlanta bank. The Bank of Camilla was to be paid a fee of 1/8 of 1% of the amount of the checks for its services. Although, as above noted, Columbian carried no ac-

count at the Bank of Camilla and the checks were, therefore, not charged to any account at the bank, and although the checks were not transmitted by the Bank of Camilla through banking channels to any other bank, it was the practice in The Bank of Camilla to run all checks which were handled by the bank in any manner through an identifying or proofing machine which stamped on each check the following legend: "Pay to the order of any Bank, Banker, or Trust Co. All prior endorsements guaranteed." The date on which the check was honored was also included in the stamp.

Although Frosteg was supposed to deliver the Columbian checks to the individual growers from whom he made purchases for the Columbian account, it developed that he did not do so. Instead, he fraudulently endorsed the Columbian checks with the name of the payees and then deposited these checks to his account and issued checks of his company, Pelham Peanut Company, to the growers.

Many checks were handled by Frosteg in this fashion and there was no difficulty until Frosteg's company, Pelham Peanut Company, found itself in financial straits and 37 of the Pelham Peanut Company checks "bounced" for insufficient funds. As might be expected, the growers who had sold their peanuts to Columbian and whose names had been forged by Frosteg went to Columbian for their money. Columbian had each of these growers endorse the Columbian check, on which the original endorsement had been forged back to Columbian and then turn over to Columbian

the Pelham Peanut Company check which had bounced. Then Columbian paid off each grower who was involved and brought suit against the Bank of Camilla for $53,624.10, which was the total amount of these 37 checks, contending that the Bank of Camilla was liable for the loss sustained because it had paid checks on which the endorsements were forgeries. The jury returned a verdict in favor of Columbian against the Bank of Camilla for the sum of $23,624.10.

The Bank of Camilla made a motion for a directed verdict at the conclusion of the Plaintiff's evidence and also at the conclusion of the introduction of all evidence in the case and the Court reserved ruling thereon, and the Bank of Camilla filed its motion for judgment notwithstanding the verdict or in the alternative for a new trial.

In considering the question here presented it is important to keep in mind that the relationship of bank and depositor did not exist in this case because Columbian never had an account at the Bank of Camilla. Therefore, the principle of law regarding the responsibility of a bank to its customers has no application here and Georgia Code Section 109A-4-401(a) relied on by the Plaintiff has no bearing in this case. The Bank of Camilla paid the Columbian checks out of its own funds and charged nothing to the account of Columbian because Columbian had no account. The checks were then sent to Columbian and Columbian had the right to refuse payment to the bank if anything appeared to be wrong with the checks.

Columbian contends that it had a right to rely upon the stamped endorsement placed on the checks by the bank when the bank paid the checks, however, it is apparent that this writing was not an endorsement to the Plaintiff nor any guarantee of any endorsement to the Plaintiff, and indeed had no meaning at all in the circumstances of this case because the endorsement was solely for the benefit of any bank, banker or trust company and Columbian is neither. This endorsement could give to the Plaintiff no right of action against the Defendant.

Georgia Code Section 109A-4-201(2)(b) provides:

> "After an item has been endorsed with the words 'pay any bank' or the like, only a bank may acquire the rights of a holder until the item has been specifically endorsed by a bank to a person who is not a bank."

In this case Columbian had each grower-payee of the checks involved endorse the check back to Columbian, for it is on these checks that Columbian seeks recovery against the Bank of Camilla. Since the Bank of Camilla did not endorse these checks the attempted transfer of the checks by the individual payees to Columbian is ineffectual and Columbian has no right of action on these checks against the Bank of Camilla.

It further appears that when Columbian reacquired its checks from the grower-payees there could then be no recovery by Columbian against the Bank of Ca-

milla because under the provisions of Georgia Code Section 109A-3-208 it is provided that:

> "Where an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been cancelled is discharged as against subsequent holders in due course as well."

Georgia Code Section 109A-3-601(3)(a) provides that:

> "The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument reacquires the instrument in his own right."

It was clear from the evidence in this case that Columbian reacquired the checks by paying the original grower-payees whose names were fraudulently endorsed and thereby gained physical possession of the checks, and in this connection the text writers in their notes to these sections of the Uniform Commercial Code which have been above quoted have stated:

> "When any party reacquires the instrument in his own right his own liability is discharged, and any intervening party to whom he was liable is also discharged as provided in Code

> Section 3-208 on reacquisition. When he is left with no right of action against any intervening party and no right of recourse against any prior party, all parties are obviously discharged."

It also seems apparent that in any case intervening endorsers are discharged as to the reacquirer, since if the reacquirer attempted to enforce it against them they would have an action back against the reacquirer. Stated otherwise, when Columbian reacquired its own checks from the grower-payees Columbian became both maker and last endorser and if they could recover against the Bank of Camilla then the bank would have a right of action against them as last endorser. The conclusion is that there can be no liability of the Bank of Camilla to Columbian by virtue of the reacquisition of the checks in question.

The evidence adduced upon the trial of this case clearly showed that Frosteg, acting through his company, Pelham Peanut Company, was an agent of Columbian. This is shown by the contract entered into between them, by the testimony of Columbian's manager, and by Frosteg himself. After discovering the forgeries of its agent Columbian voluntarily paid all of the grower-payees whose names Frosteg had forged and by so doing Columbian ratified the acts of Frosteg and it is bound by his fraudulent acts and cannot now recover against the Bank of Camilla as a matter of law.

The evidence shows that Columbian is not entitled to recover on its claim against the Bank of Camilla. Accordingly, the motion of the Bank of Camilla that judgment be entered for the Bank of Camilla notwithstanding the verdict of the jury is granted.

THE ALTERNATIVE MOTION FOR NEW TRIAL

The Court is of the opinion that the Defendant's motion for new trial in the alternative should be and it is granted if the judgment granted to the Defendant is set aside or reversed on appeal for the reason and on the grounds that the verdict of the jury is contrary to the evidence, and in the opinion of the Court the evidence is insufficient to support that verdict. There was no difference in any of the checks sued upon by Columbian except as to the face amount of the checks. All of the checks were issued in the same manner, all the endorsements were forged in the same manner, all of the checks were paid by the Bank of Camilla with its funds in the same manner, all of the checks were stamped by the Bank of Camilla in the same manner, all of the checks were delivered by the Bank of Camilla to Columbian in the same manner, and all of the checks were handled by Columbian with the grower-payees in the same manner. In this situation, if Columbian was entitled to a verdict it was entitled to a verdict in the full amount sued for, which is the total amount of the 37 checks, $53,624.10, but the jury returned a verdict for $23,624.10. Obviously, this verdict was arrived at by some arbitrary compromise in the jury room. But this is not a suit for damages sounding in tort. It is a suit on contract, and

there was no area for any compromising. There is no reasonable explanation as to how the jury arrived at this verdict in any legal manner. It cannot be explained or justified by the evidence or the applicable law. For this reason the alternative motion of the Bank of Camilla for a new trial is granted in the event the action of this Court in entering judgment for the Bank of Camilla is set aside or reversed on appeal.

An order in conformity with this opinion is this day entered.

IT IS SO ORDERED this 3rd day of December, 1971.

/s/ J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

ORDER

(Number and Title Omitted)

Filed: Dec. 6, 1971

This cause came on before me on the motion of the Bank of Camilla to set aside the verdict for the Plaintiff and to enter a judgment for the Defendant in accordance with the motion made at the close of the evidence and prior to the submission of the case to the jury, and in the alternative for a new trial.

For the reasons assigned the motion is granted and accordingly it is

ORDERED, ADJUDGED AND DECREED that the verdict of the jury rendered herein on October 28, 1971, be and the same is hereby set aside and judgment is granted Defendant, the Bank of Camilla, in accordance with the motion, and it is further

ORDERED, ADJUDGED AND DECREED that in the event the judgment granted Defendant is set aside or reversed on appeal the motion in the alternative for a new trial is granted and a new trial ordered as to the Defendant, the Bank of Camilla, on the grounds and for the reason that the Court finds the verdict to be contrary to law, contrary to the evidence, and the evidence is insufficient to support the verdict.

The Court's Opinion has been filed concurrently herewith.

This 3rd day of December, 1971.

/s/ J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-1224

THE COLUMBIAN PEANUT COMPANY,
Plaintiff-Appellant,
versus

HARRY FROSTEG, ET AL.,
Defendants,

THE BANK OF CAMILLA and FARMERS BANK OF PELHAM,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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(January 26, 1973)

Before RIVES, WISDOM and RONEY,
Circuit Judges.

RIVES, Circuit Judge: In July 1970, Columbian Peanut Company (Columbian) entered into a written contract with Frosteg and his wholly-owned corporation, Pelham Peanut Company, by which Frosteg, on a commission basis, was to purchase and store peanuts for Columbian during the 1970 crop season in the pea-

nut growing area of southwest Georgia. During the 1969 crop season a similar arrangement had existed between Columbian and Frosteg. The manner, time and quantity of the purchases were left to Frosteg's discretion.

Carrying out that agreement, Columbian turned over to Frosteg several hundred blank checks signed by Columbian and drawn on five banks (including Farmers Bank of Pelham, but not including Bank of Camilla) located in rural southwest Georgia. Frosteg usually left the blank checks at Columbian's office in Pelham, Georgia, and hired two of Columbian's employees, Mrs. Charlene Lawhorne and Mrs. Sue Strickland, to work during their off-duty hours computing the totals of each day's purchases and writing on each Columbian check the appropriate amount and the name of the respective grower-payee. The checks would then be given to Frosteg or one of his other employees. Some of the named payees actually received their checks. In a number of other instances, to keep current the bank balance of Frosteg and Pelham Peanut Company, Frosteg forged the signatures of the payees and then deposited the checks usually to the credit of Pelham Peanut Company. Frosteg would then issue to the grower a Pelham Peanut Company check in the same amount as the Columbian check. This fraudulent practice was long continued apparently with discovery, and certainly without complaint. During the preceding peanut season of 1969, Frosteg had so endorsed some 93 checks payable to various payees, totaling $139,291.99. The fraud was apparently not discovered until Pelham Peanut Compa-

ny's checks began "bouncing" in the latter part of September, 1970. The growers named as payees in 37 of the Columbian checks, totaling $55,645.33, fraudulently endorsed by Frosteg and cashed by the Bank of Camilla, and the growers named in 2 of the checks, totaling $2,020.63, fraudulently endorsed by Frosteg and cashed by Farmers Bank of Pelham, were not paid by either Frosteg or his corporation. Shortly before his fraud was discovered, Frosteg borrowed $20,000.00 from Farmers Bank of Pelham and assigned as security commissions claimed to be due him. Columbian accepted the assignment.

Columbian had received the peanuts purchased, or peanuts of like quantity and quality, and Columbian ultimately paid the agreed purchase price to each of the unpaid growers. Columbian then brought this suit asserting a right to reimbursement. Frosteg and Pelham Peanut Company did not answer or defend, but unfortunately they are insolvent. Both Bank of Camilla and Farmers Bank of Pelham answered at length. Farmers Bank of Pelham also cross-claimed on Columbian's acceptance of Frosteg's assignment of his commissions.

The liability vel non of the banks for payment on the forged endorsements of Columbian's checks turns largely on an oral agreement of Columbian with each of the banks. Columbian never made any deposit with the Bank of Camilla. It did carry a deposit in the Farmers Bank of Pelham but the checks here involved were not to be charged against that deposit. Columbian's oral agreement with each bank and with other banks

in that area was to the effect that the bank would pay its checks to growers for peanut purchases as presented; at the end of each banking day the bank would tally or total the checks and either mail or present them to Columbian's office in Pelham; Columbian would then give the bank its check drawn on the First National Bank of Atlanta for the total amount of that day's checks; as compensation for the use of the bank's money and for its services, Columbian would pay to the bank a fee of 1/8 of 1% of the total amount of Columbian's checks so handled.

The case was tried to a jury. The district court reserved ruling on the Bank of Camilla's motion for directed verdict. The jury returned a verdict against the Bank of Camilla for $23,624.10, an admittedly inadequate amount if Columbian should have any recovery. The jury returned a verdict for $20,000.00 in favor of the Farmers Bank of Pelham on its cross-claim.

On post-trial motions, the district court held that Columbian is not entitled to recover against either bank. It entered judgment notwithstanding the verdict for the Bank of Camilla, and also granted the alternative motion of the Bank of Camilla for a new trial in the event the judgment n.o.v. should be set aside or reversed on appeal. The district court denied Columbian's motion for new trial as against Farmers Bank of Pelham and also denied Columbian's motion for a partial new trial against the Bank of Camilla. Columbian appeals from the judgments entered against it on the post-trial motions.

We hold that the district court erred in ruling as a matter of law that Columbian is not entitled to recover against the banks on its claims that they wrongfully paid Columbian's checks bearing forged endorsements, but that the district court did not err in denying Columbian's motion for new trial with respect to Farmers Bank of Pelham's cross-claim against Columbian.

I.

Columbian's Claims that the Banks Wrongfully Paid Columbian's Checks Bearing Forged Endorsements.

A. Responsibility as between Drawer of Check and Bank.

In its memorandum opinion on the post-trial motions, the district court said:

> "In considering the question here presented it is important to keep in mind that the relationship of bank and depositor did not exist in this case because Columbian never had an account at the Bank of Camilla. Therefore, the principle of law regarding the responsibility of a bank to its customers has no application here * * *."

Concededly the question is a difficult one, and no case has been found where the precise relationship existed as that between Columbian and the banks in this case. Nonetheless, we are persuaded that each

bank's oral contract, based on agreed consideration to pay Columbian's checks as presented, placed upon the bank the same responsibilities and liabilities as if the checks had been paid from a general deposit of money by Columbian in the bank. In the latter case the law has been long established in Georgia that:

> "Where one deposits money in a bank or general deposit, the bank immediately becomes the debtor of the depositor for the money deposited, and undertakes, impliedly, to pay that money either to the depositor or to some person to whom he directs it paid; and, in order to discharge itself from this liability to the depositor, the bank must pay the money to the depositor, or as directed by him. The liability cannot be discharged in any other way. In the present case Burke, the depositor, drew a check in favor of Mrs. Knapp for a certain amount of money, and the bank did not pay the money to her or to her order, but paid the money to Knapp, upon a forged indorsement. How does the bank discharge its indebtedness to Burke? It has not paid the money to Burke, or to the person to whom he directed it to be paid, or to her order; and it is only in these ways that the bank can be discharged of its liability."

Atlanta National Bank v. Burke, Ga. 1888, 7 S.E. 738, 739. The Georgia courts have continued to follow the Burke case. Insurance Co. of North America v. Fourth National Bank, N.D. Ga. 1926, 12 F.2d 100, aff'd 28 F.2d

933 (5 Cir. 1928); Fulton National Bank v. Didschuneit, 92 Ga. App. 527 (1955); Citizens & S. National Bank v. New York Cas. Co., 84 Ga. App. 47 (1951).

The Burke case is also in accord with the law generally prevailing in other states:

> "Ordinarily, as between the drawer of a check and the bank upon which it is drawn, the latter is bound at its peril to determine the genuineness of the indorsements upon which it is paid; it cannot, if the drawer is free from negligence or conduct warranting his estoppel, charge against the drawer's account a check payable to a named payee or his order and paid upon a forged indorsement."

10 Am. Jur. 2d, Banks Section 623, p. 587. See also 9 C.J.S., Banks & Banking Section 356 c., p. 734, et seq.

In general the drawer of a check has like rights against an intermediary bank which cashes a check on a forged endorsement and collects it from the drawee bank.

> "Although not agreeing uniformly in the reasons given for their decisions, most courts hold as a general rule that an intermediary bank which receives a check on a forged indorsement and collects it from the drawee bank is liable to the drawer of the check for his loss, the bank's acceptance of the check for collec-

> tion being at its peril as to a possible forged indorsement."

10 Am. Jur. 2d, Banks Section 629, p. 596. The note appended to this text states in part:

> "The theory upon which recovery has been allowed by some well-considered cases has been that of the implied obligation to pay to the true owner the money received by the collecting bank and erroneously paid by it to the wrongdoer on the strength of the forged indorsement * * *."

Other theories are discussed in an annotation in 99 A.L.R.2d 638, 640-648. Apart from questions of negligence or other conduct of the drawer operating to preclude him, these strict rules of responsibility of the bank apply despite the fact that the person who forged the endorsement was an agent or employee of the drawer. First National Bank v. Guaranty Life Ins. Co., Ga. App. 1962, 164 S.E. 242; cases collected in Ann. 39 A.L.R. 2d at 648.

The Uniform Commercial Code adopted by the Georgia Legislature, effective January 1, 1964, left applicable the general principles of law not particularly displaced. Georgia Code Ann. 109A-1-103.

Specifically, Georgia Code Ann. 109A-4-102(2) provides that:

"(2) The liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located."

Section 109A-4-104 contains the following pertinent definitions:

"(g) 'Item' means any instrument for the payment of money even though it is not negotiable but does not include money."

"(a) 'Account' means any account with a bank and includes a checking, time, interest or savings account."

"(e) 'Customer' means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank."

We think that Columbian was a "customer" of the bank within the foregoing definition for either of two reasons. (1) Columbian had an "account" with the bank, though the account was tallied daily. By statute (Section 109A-4-104(a)) "'account' means any account with a bank and includes" the usual accounts. (Emphasis added.) "Account" is not limited to the accounts specifically named. (2) The bank had agreed to collect "items" for Columbian. For a consideration the bank agreed to cash and collect Columbian's

checks. Those checks were clearly "items" as defined in the Act (Section 109A-4-104(g)).

True, the "customer" owes certain duties to discover and report unauthorized signatures or alterations as specifically provided by Georgia Code Ann. 109A-4-406. Columbian did not and does not ask that judgment be rendered by the court in its favor but simply that it be accorded a trial by jury. For that reason, it would be premature for us to discuss the duties of the customer further than to observe that Columbian is not barred by the one-year limitation prescribed by section 109A-4-406(4)(b):

> "(4) Without regard to care or lack of care of either the customer or the bank
>
> "* * *
>
> "(b) a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report any alteration on on the back of the item or any unauthorized indorsement is precluded from asserting against the bank such alteration or unauthorized indorsement."

Thus Columbian falls within the strict letter of the Uniform Commercial Code as a "customer" of the bank.

Of more importance, the considerations of policy which impose a strict measure of responsibility upon a bank arising from the contract either of the drawer bank or of an intermediate bank would seem to apply also in favor of Columbian as the drawer of a check paid by a bank pursuant to a contract, even though the contract is not that of a general depositor. The bank's opportunity to determine whether an endorsement is genuine is usually better than the opportunity of the drawer of the check. The bank is also in better position to protect itself by insurance. Under usual commercial practices, such policy considerations place a strict responsibility upon a bank which contracts to cash a drawer's checks.

We conclude that the district court erred in ruling that "the principle of law regarding the responsibility of a bank to its customer has no application here."

B. Effect of Columbian's Reacquisition of Its Checks.

Columbian was liable to each grower who delivered his peanuts to Pelham Peanut Company on the faith of Pelham's own check, because the peanuts were delivered to Columbian's commission agent and ultimately either the same peanuts or peanuts of like quality and quantity were delivered to Columbian. Columbian's check intended for the grower was forged by Frosteg instead of being delivered to the grower. As between Columbian and the grower, Columbian's check did not become a completed contract, though

it did constitute evidence of Columbian's liability to pay for the peanuts purchased.

In paying each grower, Columbian received his affidavit that he had not endorsed Columbian's check, had never given anyone authority to endorse it for him, and had not received its proceeds. Columbian also had each grower sign on the back of its check already in its possesion an endorsement reading, "Pay to the order of Columbian Peanut Company."

The checks were delivered by the banks to Columbian when it reimbursed the banks for their payment. Each bank had in its customary routine stamped its endorsement on each check reading, "Pay to Any Bank, Banker or Trust Company. All Prior Endorsements Guaranteed."

Under Georgia Code 109A-4-201, such an endorsement runs only to a bank, banker or trust company. Consequently, Columbian cannot base its right to recover from the bank on the guarantee contained in the endorsement. In effect, that endorsement coupled with the delivery of the check to Columbian destroyed its negotiability. The responsibility of the banks to Columbian is based on a claim that the banks wrongfully paid Columbian's checks bearing forged endorsements, and not on the terms of the banks' endorsements of the checks.

The district court held that "Columbian reacquired the checks by paying the original grower-payees whose names were fraudulently endorsed and thereby gained

physical possession of the checks." (App. 518) After such "reacquisition," according to the district court's holding, Columbian was barred from any recovery against the banks by Georgia Code Sections 109A-3208 and 109A-3-601(3).

We do not agree. Columbian got possession of the checks when the banks were reimbursed, not at the lated time when Columbian paid the original grower-payees. Further, those sections of the Uniform Commercial Code should not have the effect of penalizing Columbian for paying the growers of the peanuts which (or the equivalent of which) it had received. By getting the grower-payee to endorse the check already in Columbian's possession, and which had ceased to be a negotiable instrument, Columbian did not relinquish its claim against the bank for wrongfully paying the check bearing a forged endorsement. Precisely to the contrary, Columbian's conduct went to prove the damage which Columbian suffered from the bank's paying to another its check intended for the grower, but of which the grower never became a holder. Sections 109A-3-208 and 109A-3-601(3) are intended to serve another and unrelated purpose of eliminating circuity in the order of responsibility. Otherwise construed, the sections would have the effect of radically depleting the rule of strict responsibility of a bank for paying a check upon a forged endorsement.

C. Frosteg as Agent for Columbian.

In entering judgment n.o.v. against Columbian on its claim against the Bank of Camilla, the district court ruled:

> "The evidence adduced upon the trial of this case clearly showed that Frosteg, acting through his company, Pelham Peanut Company, was an agent of Columbian. This is shown by the contract entered into between them, by the testimony of Columbian's manager, and by Frosteg himself. After discovering the forgeries of its agent Columbian voluntarily paid all of the grower-payees whose names Frosteg had forged and by so doing Columbian ratified the acts of Frosteg and it is bound by his fraudulent acts and cannot now recover against the Bank of Camilla as a matter of law." (App. 519, 520.)

The first paragraph of the written contract between Columbian and Frosteg's company, Pelham Peanut Company, expresses the gist of their agreement:

> "We have agreed with you that you will buy and store Spanish and Runner Segregation I Farmerstock peanuts in our name and for our account this season, 1970 Crop, at your place of business known as PELHAM PEANUT COMPANY located at Pelham, Georgia, and for such service we agree to pay a fee of $10.00 per net ton for Spanish Farmerstock and $11.00 per net ton for Runner Farmerstock." (App. 534.)

That agreement did not encompass purchases made in the name of Pelham Peanut Company and paid for by Pelham's own check. In so conducting his business, Frosteg departed completely from the scope of his a-

gency for Columbian. When later Frosteg delivered the peanuts or their equivalent to Columbian, and Columbian accepted them thinking that they were peanuts paid for by Columbian's check, Columbian became liable to the growers for the agreed purchase price because Columbian received the benefit of the growers' peanuts. Thus Columbian had become liable to the growers before it discovered the forgeries of Frosteg. Columbian's subsequent payments for the peanuts did not, in our opinion, ratify the fraudulent acts of Frosteg, but was simply performance of its liability incurred before it had any knowledge of Frosteg's fraudulent acts.

We conclude that the district court erred in ruling, as a matter of law, that Columbian is not entitled to recover against the banks on its claims that they wrongfully paid Columbian's checks bearing forged endorsements. On that issue the case should stand for a new trial.

II.

Cross-claim of Farmers Bank of Pelham

As has been stated, the jury returned a verdict in favor of the Farmers Bank of Pelham on its cross-claim for $20,000.00. Frosteg had borrowed that amount from the bank and had assigned as collateral security the commissions due him. The notice of assignment and Columbian's acceptance read as follows:

"September 14, 1970
"Columbian Peanut Company
"Pelham, Georgia 31779

"Dear Mr. Johnson:

"Please accept this letter as notice of my assignment of the commissions due me in 1970 from Columbian Peanut Company, Inc. When the commissions are paid, I would appreciate you making the check payable jointly to Pelham Peanut Company and Farmers Bank of Pelham and sending the check directly to the Bank. I further acknowledge that the commissions due as of this date are in excess of $20,-000.00.

"Please acknowledge this letter by signing in the space indicated and returning it to the Bank in the envelope provided.

"Sincerely,
"/s/ HARRY FROSTEG
"Harry Frosteg
"Pelham Peanut Company

"Accepted this 15th day of September, 1970.

"THE COLUMBIAN
PEANUT COMPANY
"/s/ H. A. JOHNSON
MANAGER"

(App. 550-551)

Thus Columbian accepted an assignment representing that "the commissions due as of this date are in excess of $20,000.00." In addition, there was evidence from which the jury could have found that Columbian's manager had by telephone confirmed to the officer of the bank, who was considering the loan to Frosteg, that Frosteg had "earned" in excess of $20,000.00 in commissions. We find no reversible error in the district court's charge with respect to the counterclaim. The district court did not abuse its discretion in denying Columbian's motion for new trial as to the counterclaim of Farmers Bank of Pelham.

The briefs and arguments of the respective parties raise other issues and questions which we have considered but find not necessary to discuss. The judgment for the Bank of Camilla entered notwithstanding the verdict is reversed and the case against that bank is remanded for a new trial. The judgment denying the motion of Columbian to grant a new trial with respect to its claim against Farmers Bank of Pelham is reversed and the case is remanded for a new trial on Columbian's claim that said bank wrongfully paid Columbian's checks bearing forged endorsements. The judgment denying Columbian's motion for new trial on the cross-claim of Farmers Bank of Pelham against Columbian is affirmed, provided that if the judgment on that cross-claim has not been earlier satisfied, Columbian shall be entitled to credit against it the amount of any judgment which it may recover against the Farmers Bank of Pelham on its claim against said bank. The costs of appeal are taxes three-fourths a-

gainst the Bank of Camilla and one-fourth against the Farmers Bank of Pelham.

AFFIRMED AS TO THE CROSS-CLAIM OF FARMERS BANK OF PELHAM and REVERSED AND REMANDED AS TO COLUMBIAN'S ORIGINAL CLAIMS.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Jan. 26, 1973, 5 Cir., 1973, ____ F.2d ____).

(April 13, 1973)

Before RIVES, WISDOM and RONEY, Circuit Judges.

PER CURIAM: The petition for Rehearing filed on behalf of the Bank of Camilla is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

GEORGIA CODE SECTIONS CITED

1. Section 109A-4-401(a):

"As against its customer, a bank may charge against his account any item which is otherwise properly payable from that account even though the charge creates an overdraft."

2. Section 109A-4-201(2)(b):

"After an item has been endorsed with the words 'pay any bank' or the like, only a bank may acquire the rights of a holder until the item has been specifically endorsed by a bank to a person who is not a bank."

3. Section 109-A-3-208:

"Where an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been cancelled is discharged as against subsequent holders in due course as well."

4. Section 109A-3-601(3)(a):

"The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument reacquires the instrument in his own right."

5. Section 109A-1-103:

"Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

6. Section 109A-4-102(2):

"(2) The liability of a bank for action or nonaction with respect to any item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located."

7. Section 109A-4-104:

"(g) 'Item' means any instrument for the payment of money even though it is not negotiable but does not include money.

"(a) 'Account' means any account with a bank and includes a checking, time, interest or savings account.

"(e) 'Customer means any person having an account with a bank or for whom a bank has agreed to collect items and includes a bank carrying an account with another bank."

8. Section 109A-4-406(4)(b):

"(4) Without regard to care or lack of care of either the customer or the bank

"* * * *

"(b) a customer who does not within one year from the time the statement and items are made available to the customer (subsection (1)) discover and report any alteration on the back of the item or any unauthorized indorsement is precluded from asserting against the bank such alteration or unauthorized indorsement."

9. Section 109A-3-208:

"Where an instrument is returned to or reacquired by a prior party he may cancel any indorsement which is not necessary to this title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his indorsement has been cancelled is discharged as against subsequent holders in due course as well."

10. Section 109A-3-601(3):

"(3) The liability of all parties is discharged when any party who has himself no right of action or recourse on the instrument

"(a) reacquires the instrument in his own right; or

"(b) is discharged under any provision of this Article, except as otherwise provided with respect to discharge for impairment of recourse or of collateral.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-1224

D. C. Docket No. CA-1094

THE COLUMBIAN PEANUT COMPANY,
Plaintiff-Appellant,

versus

HARRY FROSTEG, ET AL,
Defendants,

THE BANK OF CAMILLA and
FARMERS BANK OF PELHAM,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Georgia

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Before RIVES, WISDOM and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for

he Middle District of Georgia, and was argued by ounsel;

ON CONSIDERATION WHEREOF, It is now here rdered and adjudged by this Court that the judgment f the said District Court as to the cross-claim of armers Bank of Pelham in this cause be, and the ame is hereby affirmed;

It is further ordered that the judgment of the said istrict Court as to Columbian's original claims in his cause be, and the same is hereby reversed; and hat this cause be and the same is hereby remanded to he said District Court in accordance with the opinion f this Court;

It is further ordered that defendant-appellee, The ank of Camilla, be condemned to pay three-fourths of he costs on appeal to be taxed by the Clerk of this ourt; and that defendant-Appellee, Farmers Bank of elham, be condemned to pay one-fourth of said costs.

January 26, 1973

ssued as Mandate: